

**INDIANA COURT OF APPEALS  
CASE AT A GLANCE**



**CONTRACT LAW**

**Is the Evansville Vanderburgh Public Library entitled to insurance coverage under its all-risk policy with Hartford Casualty Insurance Company for damages sustained to a building during the construction of its new Central Library?**

*Hartford  
Casualty  
Insurance  
Company  
v.  
Evansville  
Vanderburgh  
Public  
Library*

**Appeal from:**  
Vanderburgh  
Superior Court  
(Evansville)

The Honorable  
Wayne  
Trockman,  
Judge

**Oral  
Argument:**  
October 24,  
2006  
12:00 noon –  
1:00 p.m.  
30 minutes  
each side

**CASE SYNOPSIS**

**Facts and Procedural History**

In 2000, the Evansville Vanderburgh Public Library acquired a historic building (“the 805 Building”) with the intent to integrate the building into the new Central Library. The Library also acquired an old convention center located on the property adjacent to the 805 Building. The convention center was demolished and an underground parking garage was to be built on that site. Excavation for the garage included installing an earthwork retention system, one purpose of which was to protect the 805 Building during the excavation. Industrial Contractors, Inc. was hired to perform the excavation work for the underground parking garage.

On February 28, 2002, Industrial Contractors began to install sheet piling for the excavation retention system using a high-frequency, variable moment vibratory hammer. The sheet piling was installed along the west and south edges of the 805 Building. The southwest corner of the 805 Building was damaged during the installation of the sheet pilings. After discovering the damage, Industrial

Contractors proceeded to install additional sheet piling with an impact hammer as recommended by the project engineer. When Industrial Contractors excavated the dirt behind the sheet wall, the building suffered additional damage. Eventually, the Library determined that the 805 Building was a total loss requiring demolition.

The Library submitted a notice of claim to its insurance carrier, Hartford Casualty Insurance Company. Hartford denied coverage of the Library’s claim. Thereafter, the Library filed a complaint against Hartford in the Vanderburgh Superior Court alleging breach of contract and seeking a declaratory judgment that Hartford must indemnify the Library for the damage to the 805 Building.

The all-risk policy at issue provides, in pertinent part:

**COVERED CAUSES OF LOSS**

Covered Causes of Loss means loss caused by direct physical loss or damage to Covered Property within the policy period stated on the Common Policy Declarations:

- i. Unless the loss is excluded in the General Exclusion or the Specific Exclusion; or

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ii. Unless the loss is excluded or limited within the provisions for specific coverages or types of property

iii. Subject to the Limits of Insurance and Deductibles stated in the Declarations or stated in the Coverages.

**A. GENERAL EXCLUSION**

We will not pay for loss or damage caused by, resulting from, or arising out of any acts, errors, or omissions by you or others in any of the following activities, regardless of any other cause or event that contributes concurrently, or in any sequence to the loss or damage:

1. Planning, zoning, developing, surveying, testing or siting property;

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3. Any of the following performed to or for any part of land, buildings, roads, water or gas mains, sewers, drainage ditches, levees, dams, other structures or facilities, or any Covered Property;

a. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; or

b. Furnishing of work, materials, parts or equipment in connection with the design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction[.]

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**Ensuing Loss Coverage:** If physical loss or damage by a Covered Cause of Loss ensues, we will

pay only for such ensuing loss or damage.

**Parties' Arguments and Trial Court Ruling**

The Library and Hartford filed cross-motions for summary judgment.

**Glossary of Terms****SUMMARY JUDGMENT**

A procedural device that allows for the speedy disposition of a controversy without the need for trial; a judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the party requesting the judgment is entitled to prevail as a matter of law. The trial court considers the contents of the motion for summary judgment and the evidence submitted by the parties to determine whether there is a genuine issue of fact. (BLACK'S LAW DICTIONARY 1476 (8<sup>th</sup> ed. 2004)).

In its motion, the Library argued that the damage to the 805 Building falls under the insurance policy's grant of insurance coverage, i.e. the Library sustained a "loss caused by direct physical loss or damage to Covered Property within the policy period[.]" The Library also asserted that the General Exclusion does not bar coverage, but even if it did, the policy's Ensuing Loss Coverage is an exception to the General Exclusion. Therefore, the Library's replacement cost of the 805 Building is covered under the policy.

In its motion, Hartford argued that under the plain language of the General Exclusion, Earth Movement Exclusion, and Workmanship Exclu-

## Case Synopsis (continued)

sion, the Library did not have coverage for construction projects and the type of damage that occurred to the 805 Building.

In ruling on the parties' cross-motions for summary judgment, the trial court found that the exclusions in the all-risk Hartford policy do not apply to the Library's loss. Specifically, the trial court concluded that the "General Exclusion would only encompass the cost to rectify the faulty pile-driving operations adjacent to the 805 Building. The exclusion does not encompass the damage to the 805 Building which resulted from these operations."

Moreover, the court determined that "the Library's loss here is covered as an ensuing loss from the defective pile-driving operations on property adjacent to the 805 Building." Finally, the trial court concluded that the Earth Movement Exclusion does not apply to manmade earth movement, and the Workman-

ship Exclusion is limited to "work done on Covered Property," but the pile-driving was done on land adjacent to the 805 Building.

Accordingly, the trial court entered summary judgment for the Library and declared, "there is coverage for the Library's losses under the Hartford all-risk policy."

Hartford appeals and argues that the trial court erred in concluding that the exclusions in the all-risk policy do not apply to the Library's loss.



### Opinion in this case expected:

By the end of  
Calendar Year  
2006

Court of Appeals opinions are available online at <http://www.in.gov/judiciary/opinions/appeals.html>.

Locate archived opinions at <http://www.in.gov/judiciary/opinions/archapp.html>

**For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>**

#### Or contact:

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## TODAY'S PANEL OF JUDGES

### **Hon. Margret G. Robb (Tippecanoe County), Presiding**

- Judge of the Court of Appeals since July 1998

**Margret G. Robb** was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis. Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an

officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YMCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue. Their son, Douglas, a graduate of the U.S.N.A., recently embarked on his first deployment.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began just prior to the Court's centennial in 2001.

**Today's oral argument is the 168th case the Court of Appeals has heard "on the road" since early 2000.**

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

## TODAY'S PANEL OF JUDGES

### **Hon. Paul D. Mathias (Allen County)**

- Judge of the Court of Appeals since March 2000

**Paul D. Mathias** was appointed to the Court by Governor Frank O'Bannon in March, 2000. Judge Mathias is a fifth generation Hoosier and grew up in Fort Wayne. He graduated from Harvard University, *cum laude*, in 1976 and from Indiana University School of Law – Bloomington in 1979, where he was a member of the law school's Sherman Minton Moot Court Team and *Order of Barrister*. He practiced law for six years in Fort Wayne, concentrating in construction law, personal injury and appellate practice.

In 1985, Judge Mathias was appointed Referee of the Allen County Small Claims Court, where he served until his appointment as Judge of the Allen Superior Court – Civil Division by Governor Evan Bayh in 1989.

Judge Mathias served as an officer of the Indiana Judges Association from 1993 to 1999 and as its president from 1997 to 1999. He received the Centennial Service Award from the Indiana State Bar Association in 1996, and a Sagamore of the Wabash Award from two governors.

Judge Mathias, who was retained on the Court by election in 2002, is married and has two sons.

### **Hon. Michael P. Barnes (St. Joseph County)**

- Judge of the Court of Appeals since May 2000

**Michael P. Barnes** was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon on May 22, 2000. Judge Barnes received his B. A. from St. Ambrose College in Davenport, Iowa in 1970 and his J.D. from the University of Notre Dame Law School in 1973. He was a Deputy Prosecuting Attorney and privately practiced law in South Bend from 1973 to 1978.

In 1978 he was elected the St. Joseph County Prosecuting Attorney, a position he held for 20 years. During that tenure, Judge Barnes was elected President of the National District Attorneys Association (1995-1996), Chairman of the Board, Indiana Prosecuting Attorneys Council (1982-1983, 1992-1993), President of the St. Joseph County Bar Association (1992-1993), National Board of Trial Advocacy (1995-1996), National Advisory Council on Violence Against Women (1997), Chairman of the Board of Regents, National College of District Attorneys (1997-1998), American Prosecutor's Research Institute (1997-1998), and various other professional and civic organizations.

Judge Barnes is a member of the Indiana Bar Foundation, the St. Joseph County Bar Association, and serves on the Board of Directors of the Friends of the St. Joseph County Juvenile Justice Center.

Judge Barnes was retained on the Court of Appeals by election in 2002. He is married to Alberta Edwards Barnes, and they are the parents of two sons, Tim and John.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.





## ATTORNEYS FOR THE PARTIES

### **For Appellants, Hartford Casualty Insurance Co.:**

**Thomas H. Bryan**  
**Fine & Hatfield Law Firm**  
**Evansville, Indiana**



**Thomas H. Bryan** graduated from Purdue University in 1966 with a B.S. in Mechanical Engineering. He attended IU Law School in Bloomington, graduating in 1969. Mr. Bryan reports that during his senior year, he was on then-freshman faculty member Patrick Baude's first National Moot Court team. (Professor Baude recently informed Mr. Bryan that the reason he and his two fellow members lost their first round of competition at the University of Tennessee is that the local judges complained they couldn't understand their northern accents!)

After teaching and researching at IU for two years, Mr. Bryan started private practice in Chicago Illinois in 1971, first taking the Indiana bar exam and then the Illinois exam. In Chicago, he was engaged in a trial practice, both from plaintiff and defense perspectives. He returned to his hometown of Evansville, Indiana in 1977. He joined his present firm, Fine & Hatfield. Always focused in a trial practice, he has been primarily engaged in insurance defense and handles cases dealing with personal injury, products liability, and professional malpractice, both medical and attorney.

This practice has also included the review and interpretation of insurance policies in a given factual situation, as can be seen in the case set for oral argument in Bloomington.

Mr. Bryan has argued before the Indiana Court of Appeals, the Indiana Supreme Court, the 7th Circuit Court of Appeals, and has filed a petition for certiorari before the United States Supreme Court. His most recent opinion was a "win": *Joseph Glotzbach, CPA v. Froman*, September 26, 2006.

He has been active in local not-for-profit organizations, serving as president of the Evansville Museum, the Evansville Philharmonic, and the Evansville Bar Association. He has been married for 30 years to Karen who teaches middle school French. They have two children, J.P., age 22 and Colleen, age 25.

His firm has 10 attorneys in a general practice with focus areas of litigation, corporate, transactional, employment and estate work.

## ATTORNEYS FOR THE PARTIES

**For Appellees, Evansville Vanderburgh Public Library:**  
**Steve Barber**  
**Barber & Shoulders LLP**  
**Evansville, Indiana**



**Steve Barber** is a member of the law firm Barber & Shoulders in his hometown of Evansville. He graduated Phi Beta Kappa from Indiana University in 1970 and received his J.D. from IU in 1974 (*cum laude*), where he was inducted into the Order of the Coif and was the Note Editor for the Indiana Law Journal. He is admitted to practice before the Indiana Supreme Court, the U. S. District Court for the Southern District of Indiana, the U.S. Court of Appeals for the Seventh Circuit, the U.S. Court of Appeals for the Federal Circuit, and the United States Supreme Court. Mr. Barber's areas of legal practice include civil litigation, commercial law, corporate litigation, insurance, construction law, real estate, labor law, and trust and estate law.

Mr. Barber was an Adjunct Professor at the University of Evansville from 1976 to 1993. He speaks regularly on legal topics to ICLEF

sessions and interest groups. He is a member of the Evansville and Indiana State Bar Associations, the American Trial Lawyers Association, and Outstanding Lawyers of America. He is a Certified Family Law Mediator and has served as mediator in numerous civil and family law matters.

Mr. Barber remains active in the Evansville community by serving on a number of local boards, including the Evansville Bar Association, the University of Evansville Paralegal Advisory Board, the Sewer and Water Department Board, the Family Law Rules Committee, and the Evansville Airport Board. He has served as President of the Evansville ARC, the Family & Children Services Board, and the Legal Aid Society. He is a Founding Member of the Ozanam Family Shelter.

## AMICUS BRIEFS

*A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.*

- There are no amicus briefs filed in this case.